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State Vs. Pareswar Ghasi

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Court : Orissa

Decided On : Aug-24-1967

Reported in : AIR1968Ori20; 33(1967)CLT1193; 1968CriLJ201

Judge : G.K. Misra and ;A. Misra, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 4, 417(1) and 423; Indian Penal Code (IPC), 1860 - Sections 395, 411 and 412; Evidence Act, 1872 - Sections 9, 145, 155 and 157

Appeal No. : Govt. Appeal No. 19 of 1965

Appellant : State

Respondent : Pareswar Ghasi

Advocate for Def. : C.V. Murty, Adv.

Advocate for Pet/Ap. : R.C. Patnaik, Adv. for ;Standing Counsel

Disposition : Appeal allowed

Judgement :

G.K. Misra, J.

1. Respondent Pares-war Ghasi stood charged under Sections 395 and 412, I.P.C. and was acquitted. The appeal is against the order of acquittal.

2. Prosecution case may be stated in brief. A dacoity was committed in the house of informant Antarjyami Misra (P. W. 1) at about 11 p.m. on 20-11-60 in village Ghungi in the district of Bolangir. F.I.R. (Ex. 1) was lodged on the next day at 7 p.m. Some of the orgnaments stolen from the house were referred to by descriptions in the F. I. R. Cash and other articles removed by dacoity were also mentioned in the FI.R. In course of investigation of Gaisilet P. S, case No. 2 of 1961 under Section 395, I. P. C.. the accused was arrested on 24-7-61. While in police custody the respondent gave information that he had concealed certain stolen ornaments in the wall of his house. In consequence thereof many gold ornaments were recovered from a hole in the wall of one of the rooms of the accused as pointed out by him on 26-7-61. The mouth of the hole had been closed with a brick and plastered with mud. The ornaments had been kept in two tin boxes. Out of 19 items of gold ornaments recovered, 11 items (M. Os. 1 to XI) were identified by P. W. 1 in a test identification parade held by the Sarpanch of Padmapur (P. W. 14) on 31-8-61. The T.I.P. report is Ex. 9.

The accused admitted recovery of M.Os. I to XI from the hole in the wall, but claimed them to be his own. He pleaded that he concealed those ornaments in the wall for safe protection as there was a dacoity in his own house in Bhadra 1960.

3. The learned Assistant Sessions Judge accepted the case of dacoity in the house of P, W. 1. On the conclusion that the prosecution failed to prove that M. Os. I to XI belonged to the family of P. W. 1 he acquitted the accused.

4. The main reasons, which influenced the learned Judge for recording the order of acquittal, have been summed up in paragraph 19 of his judgment. It is unnecessary to repeat those grounds as they would be dealt with in course of discussion.

5.The power of this Court in an appeal against order of acquittal is no longer in doubt and has been settled in a series of Supreme Court decisions. The appellate Court is to keep in mind that the presumption of innocence in favour of the accused has been reinforced by the factum of acquittal. It is to closely examine the grounds of the order of acquittal and to see whether they are reasonable. That apart, the trial Court had full opportunity of seeing the witnesses. Its assessment of

evidence is not to be lightly brushed aside unless no reasonable person can accept the same. These are broadly the principles an appellate Court is to keep in view while setting aside an order of acquittal.

6.One of the grounds which influenced the learned Judge was that Mohan Misra (P. W. 6), father of P. W. 1 had no means to acquire so much of gold ornaments as on the evidence of P. W. 4 it appeared that Mohan was begging about 5 to 7 years ago. Mohan did not submit any account of money-lending and paddy-lending business. The learned Judge accordingly held that he was not in a position to accumulate 18 tolas of gold ornaments which was the weight of M. Os. I to XI within 5 to 7 years.

We are not much impressed by the reasoning or the conclusion. P. Ws. 1 and 6 asserted that they have 30 to 40 acres of land in the village and get an yield of 250 to 300 Purugs of paddy and have got money-lending and paddy-lending business. From our experience we know that a person having an yield of the aforesaid quantum of paddy can easily afford to have much more than 18 tolas of gold in a course of 5 to 7 years. Their statements cannot be lightly brushed aside in the absence of any evidence to the contrary, merely because they did not produce money-lending and paddy-lending certificates. We have come across many rich persons not obtaining money-lending or paddy-lending certificates to avoid payment of income-tax. P. Ws. 1 and 6 come from an ex-state area. There money-lending and paddy-lending can easily be carried on without detriment to the business even without certificates. The learned Judge indulged in speculative arguments. In this case the ownership of the entire assets of P.W. 1 was not in issue and the prosecution case could not have been thrown out on the ground that there was no probability of P. W. 1 having the ornaments within a period of 8 to 7 years. No reasonable person can accept the aforesaid reasoning for discarding the prosecution case. There are enough materials on record to justify a conclusion that P. W. 1 could easily own 18 tolas of gold ornaments.

7.The next reasoning for discarding the prosecution case was that the ornaments were not properly identified as belonging to the family of P. W. 1. P. W. 11 is the mother and P. W. 12 is the wife of P. W. 1. P. Ws. 1, 6, 11 and 12 identified M. Os.

I to XI in Court. Over and above, P. W. 1 had identified those ornaments in a T. I. Parade held by Sarpanch (P. W. 14). The learned Judge did not accept the identification evidence for reasons which may be quoted --

'These ornaments did not bear any identification mark. Evidences of P. Ws. i, 6, 11 and 12 are not satisfactory and they could not identify these ornaments in a satisfactory way. It became difficult for them to identify these ornaments from mere user. They deposed that those ornaments were being used on ceremonial occasions few and far between and so identification of these ornaments due to their user could not be possible in a satisfactory way. P. W. 1 did not depose that he identified these ornaments in the T. I. Parade at Padampur. But it is believed that the Sarpanch (P. W. 14) held the T. I. Parade. P, W. 14 showed a cut ring to P, W. 1 but that had not been mixed up with a similar cut ring for identification. It is believed that P. Ws. 1, 6, 11 and 12 who are the two ladies of this family had been tutored to identify the ornaments by P. Ws. 1 and 6. Though P. Ws. 1, 6, 11 and 12 had talked and consulted each other before P. W. 1 lodged a report at the Bolangir P. S. on the next day of occurrence, P. W. 1 named only Patrimali, Gutimali, Gajabandhmali and Jhalka in the F.I.R. (Ex. 1).'

It is necessary to examine the cogency of these reasoning.

8. P. W. 1 appended a list of cash, articles and ornaments stolen from the house in the F.I.R. Item 3 of the list refers to gold necklaces of different types. Mention was made of Patrimali, Gutimali, Gajadantamali (same as Gajabandhmali), gold bangles and fold Jhalka. M. O. I. is two pieces of gold halka. M. O. IV is one gold Patrimali. M. O. V is one gold Gutimali. M. O. VI is one gold Gajabandhamali, Thus some of the gold ornaments recovered from the house of the accused were clearly described in the F.I.R. ttself. P. W. 1 stated that these ornaments were not being used daily but on ceremonial occasions, P. W. 1 is 30 years old and must have seen many ceremonies each year when the ornaments were being worn by his mother and wife. Thus he had full opportunity of knowing those ornaments during user on ceremonial occasions. He was in a position to identify those ornaments even though they had no particular identification marks. The reasoning of the learned Judge that the inmates of the house could not identify the ornaments

merely because they were being used on ceremonial occasions, or had no identification marks, does not appeal to us. The evidence of P. Ws. 6, 11 and 12 is of the same pattern. The identification evidence in Court is substantive evidence, and unless any intrinsic infirmity appears in the evidence of the deponents, there is no reason why their evidence in Court should not be accepted.

9. That without identification marks the ornaments can be properly identified is supported by good authority. In AIR 1954 Mad 433, Public Prosecutor v. I. C. Lingiah his Lordship observed thus --

'The only point of criticism advanced by the learned Magistrate is that these articles are of common use and bear no particular identifying marks and consequently no reliance can be placed on the testimony of these identifying witnesses. But in advancing this criticism it is forgotten that small and even nice points of differences distinguishing one thing from others of the same kind may merely by frequent sight of them and without any special attention to them make an impression on the mind. They are component parts of the thing and go to make the whole of which the mind receives an impression. In this case the impression is the general appearance of the thing. This sort of impression is exceedingly common; a workman has it of his tools and most people have it of their dress, jewellery and other things they are frequently seeing, handling or using. It occurs every day that by remembrance of their general appearance a carpenter, mason or other workman recognises his tools; and dress, jewellary or other property is known by its owner. Undoubtedly animals and things may be Identified by those familiar with them. Observation teaches that such identification may be safely relied upon. But at the same time a witness would not be able to formulate his reasons for the identification since it is based upon general untranslatable impressions of the mind. I may readily recognise my veshti, my cow, my wife's addigai or my friend's handwriting in the midst of a multitude of other things in most respects like them. But if questioned I would not be able to formulate any cogent or intelligent reason for the identification, It would be fatuous to discredit such identification on the ground that reasons are not being formulated for them.

This passage has our respectful concurrence.

The advocate for the accused in the court below showed certain ornaments which were not exhibited in the case and asked P. W. 6 whether he could identify the same as belonging to him. He gave a clear answer that they did not belong to him F. W. 12 asserted in cross-examinatoin that though there was no identifying mark in the ornaments, she could identify those as she recognised them. We are satisfied that the evidence of identification given by these witnesses is acceptable even though the ornaments had no particular identifying marks. The reasons given by the learned Judge for discarding the identification evidence in court do not impress us.

10. P. W. 1's identification in court gets corroborated by Ex. 9 (T. I. P. report) and the evidence of the Sarpanch (P. W. 14). Under Section 9 of the Evidence Act, facts which establish the identity of anything are relevant. The statement of P. W. 1 before P. W. 14 is a former statement of his and is not substantive evidence. A former statement can be used either for contradiction under Sections 145, 155 or for corroboration under Section 157 of the Evidence Act. P. W. 1 in course of examination was not contradicted by any statement in Ex. 9 in accordance with Section 145, Evidence Act. The learned Judge held that the statement regarding the T. I. Parade was not put to P. W. 1 and as such the report (Ex. 9) and the evidence of P. W. 14 cannot be used for corroboration of the evidence of P. W. 1. Mr. Murty adopted the same line of reasoning. This contention requires careful examination.

11. Section 157, Evidence Act run thus --

'In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved.'

The first part of the section has no application to this case. The T. I. Parade took place on 31-8-1961 before P. W. 14. The question for consideration is whether P. W. 14 was an authority legally competent to investigate the fact.

12. Before answering this question, the objection of Mr. Murty that the report of the T. I. Parade cannot be used for corroboration as no question on that point was put to P. W. 1 may be examined. Factually, the position is correct that P. W. 1 was not asked any question regarding the report Ex. 9 and whether he identified the ornaments before P. W. 14. In AIR 1956 SC 738, Awadh Behari v. State of Madhya Pradesh there is some observation to lend countenance to such a criticism. At page 743, their Lordships observed thus --

'The prosecution would not have been unaware as to what its own witness even though, to be examined later on, was going to say in Ms chief examination regarding what a previous witness stated to him. If it was sought to be made use of, it is clear that the very person to whom it is ascribed must be given an opportunity to explain it. To say the least, P. W. 6 should have been recalled for the purpose. There is, therefore, every justification for the grievance that on a crucial matter inadmissible evidence given some months later actually turned the scale.

The matter was however, analysed by e larger Bench in AIR 1962 SC 424, Ramratan v. State of Rajasthan. There the question was directly posed and was answered by their Lordships thus --

'There is nothing in Section 157 which requires that before the corroborating witness deposes to the former statement the witness to be corroborated must also say in his testimony in court that he had made that former statement to the witness who is corroborating him. It is true that often it does happen that the witness to be corroborated says that he had made a former statement about the fact to some person and then that person steps into the witness-box and says that the witness to be corroborated had made a statement to him about the fact at or about the time when the fact took place. But in our opinion, it is not necessary in view of the words of Section 157 that in order to make corroborating evidence admissible, the witness to be corroborated must also say in his evidence that he had made such and such statement to the witness who is to corroborate him, at or about the time when the fact took place.'

13. On the aforesaid principle Ex. 9 and the evidence of P.W. 14 are admissible in evidence to corroborate the identification evidence of P. W. 1, even though P. W. 1 made no reference to the Test Identification before P. W. 14 as recorded in Ex. 9. Mr. Murty's contention on this aspect of the matter has no force and is accordingly refected.

14. It is now necessary to go back to the question whether P. W. 14 was an authority legally competent to investigate the fact. It is to be emphasized that the expression is 'competent to investigate the fact and not the case'

The former statement made to any person investigating a fact is not enough. The investigation must be by a person legally competent. It has been held that in order that a person must be legally competent, he must have power under some law statutory or otherwise, (See AIR 1919 Mad 487. Kumaramuthu v. Emperor; AIR 1928 Cal 732, Emperor v. Ramchandra and AIR 1949 Cal. 629. Tobarak Mondal v. The King) The learned Government Advocate has not brought to our notice any provision of law or rules under which the Sarpanch (P. W. 14) was legally competent to hold the Test, identification Parade.

15. The word 'Investigation' has not been defined in the Evidence Act or in the General Clauses Act. Under Section 4(1) of the Criminal Procedure Code, 'investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf. The word 'investigate' used in Section 157 of the Evidence Act is not to be understood in the narrow sense in which the word is used in the Criminal Procedure Code. It must carry its ordinary dictionary meaning in the sense of ascertainment of facts, sifting of materials, search for relevant data (See 1961 (2) Cr. LJ 71 (Cal), Sarju v. State of West Bengal).

Though the expression 'investigate' would thus be given a wide meaning, it is not possible to say in this case that the Magistrate of Padmapur had jurisdiction to authorise the Sarpanch to hold the T. I. Parade. In the facts and circumstances of this case, we hold that P. W. 14 was not a person legally competent to investigate the factum of identification within the meaning of Section 157 of the Evidence Act

Ex. 9 and the evidence of P. W. 14 cannot, therefore, be used for purpose of corroboration of the evidence of P. W. 1. It need hardly be stated that Ex. 9 is a former statement of P. W. 1 and can be used for contradiction under Section 145 and for impeaching his credit under Section 155. The restrictions imposed in Section 157 do not find place in Section 145 or 155 of the Evidence Act.

As a result of the aforesaid analysis Ex. 9 and evidence of P. W. 14 must be ruled out from consideration.

16. The residue of evidence available is the substantive evidence of identification in Court of P. Ws. 1, 6, 11 and 12 and the corroboration of the evidence of P. W. 1 by the F.I.R. in respect of some of the ornaments. As we are of opinion that these pieces of substantive evidence in court are beyond reproach, the conviction would be well founded on their basis.

17. Mr. Murty lastly contends that the respondent was not in the exclusive possession of the house from where the ornaments were recovered. Such a plea was never taken and in fact the accused himself gave discovery of the ornaments while in the police custody from the hole in the wall which had been plastered. We are of opinion that the accused was in possession of the ornaments which were removed from the house of the informant in the dacolty.

18. The next question for consideration is whether the accused is liable to be convicted for an offence under Section 412 I.P.C. under which he was charged. The Section runs thus--

'Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly received from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.'

There is no prosecution evidence that the accused knew or had reason to believe that the stolen property was transferred by a commission of dacoity. Doubtless the ornaments were stolen as a result of dacoity and those were recovered from the possession of the accused. These two facts themselves are not sufficient to show that the accused either knew or had reason to believe that the ornaments had been transferred by the commission of a dacoity. A conviction under Section 412 I.P.C. would not therefore be well founded. He is liable to be convicted under Section 411 I.P.C. A sentence of two years' R. I. would meet the ends of justice.

19. In the result, the judgment under appeal is set aside and the respondent is convicted under Section 411 I.P.C. and sentenced to R.I. for two years. The Government Appeal is allowed. M. Os. I to XI may be returned to the informant.

A. Misra, J.

20. I agree.

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